ORIGINAL

In the

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY, Petitioner, v. SEABOARD ALLIED MILLING CORP., ET AL., Respondents.	No. 78-575
INTERSTATE COMMERCE COMMISSION, Petitioner, v. SEABOARD ALLIED MILLING CORP., ET AL., Respondents.	No. 78-597
SEABOARD COAST LINE RAILROAD COMPANY, ET AL., Petitioners, v. SEABOARD ALLIED MILLING CORP., Respondents.	No. 78-604

Washington, D. C.
April 23, 1979

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Washington, D. C.

Monday, April 23, 1979

The above-entitled matter came on for argument at

11:07 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MARK L. EVANS, ESQ., General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; on behalf of the Petitioner in No. 78-597

MS. WANDALEEN PYNTER, ESQ., 500 Water Street, Jacksonville, Florida 32202; on behalf of the Petitioners in No. 78-604

RICHARD A. ALLEN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent United States

JOHN H. CALDWELL, ESQ., 900 - 17th Street, N. W., Washington, D. C. 20006; on behalf of the Respondents Seaboard Allied Milling Corp., et al.

HAROLD E. SPENCER, ESQ., Belnap, McCarthy, Spencer, Sweeney & Harkaway, 20 North Wacker Drive, Chicago, Illinois 60606; on behalf of the Respondents Board of Trade of the City of Chicago, et al.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-575, Southern Railway v. Seaboard and the consolidated cases.

Mr. Evans, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.,

ON BEHALF OF THE PETITIONER IN NO. 78-597

MR. EVANS: Mr. Chief Justice, and may it please the Court:

These consolidated cases are here on certiorari to the Court of Appeals for the Eighth Circuit. They present a discrete issue of reviewability -- are the courts empowered to review an ICC decision not to investigate a proposed railroad rate change before the change takes effect.

The Court of Appeals held that such a decision is reviewable and we argue that it is not. The case started in August 1977 when the Southern Railroads filed tariffs proposing a 20 percent seasonal increase on the rates for the transportation of grain in the southern territory. The tariff was to last for three months, and it was among the first of the tariffs filed under the 1976 legislation which directed the Commission to allow the filing of such demand sensitive rates.

The purpose of the statute was to give shippers an incentive to reduce peak period transportation and to better use the national car pool of railroad freight cars. Several groups of shippers, including the respondents here, filed protests with the Commission, arguing that the increases violated a variety of sections of the Act, and they asked the Commission to suspend and investigate the rates under section 15. The Commission decided not to suspend or investigate, essentially for two reasons.

First, it was not convinced that the shippers had made convincing arguments on the merits of their claims of unlawfulness; and, second, because the Commission wanted to carry out the congressional policy of creating a regulatory climate that would be conducive to this kind of experimentation in railroad ratemaking.

The shippers filed a petition for review in the Court of Appeals for the Eighth Circuit. They sought and got a stay from the court for approximately eight days which enjoined the railroads from collecting the rates during that period.

The Court of Appeals declined to review the Commission's decision not to suspend the rates, but it held that it could review the decision not to investigate the rates, a decision that it characterized as a termination of an investigation into the lawfulness of the rates.

The Court of Appeals reasoned that the shippers had made substantial allegations that the tariffs were patently unlawful, that the Commission had a duty to investigate, and that its, what it referred to as a premature termination of the investigation was improper. The decision was in conflict with the decision of the District of Columbia Circuit, which had held unreviewable a Commission decision not to investigate under section 15 of the Act.

The key to the case I believe is in the structure of the Act's rate investigation and complaint procedures. There are two ways that the Commission can investigate a railroad rate. Under section 15, it has the power before the effectiveness of the rate to institute an investigation and during that period to suspend the rate for up to seven or ten months, depending on whether it seeks an extension of time, pending completion of the investigation.

If it decides against instituting a section 15 investigation, anyone can complain under section 13 and the Commission must investigate in response to that complaint.

QUESTION: Am I right in thinking, Mr. Evans, that under a section 13 complaint, the Commission doesn't simply sit as an adjudicator but it has an affirmative duty to investigate?

MR. EVANS: It must investigate, it must begin a proceeding. It is in effect an adjudicator of the proceeding,

that is basically a dispute between the complaining party on the one hand and the carrier on the other.

QUESTION: But can it just sit back and say you two contestants bring your evidence before me and we will decide, or does it have to participate in the investigation?

MR. EVANS: No, I think it is more the former. It does not necessarily actively participate in the investigation but, by the same token, of course, it has the power to develop the record if the record is not being adequately developed. But investigation is a term that was used in the original Act. Really, in the recodification, it has been changed to the word proceeding, it is a proceeding before the agency and it can be instituted either on its own motion, in which case there may not be a complaining party and in which case it would develop the record, or it could be instituted in response to a complaint.

QUESTION: So the investigation is the same under either 13 or 15?

MR. EVANS: Essentially the same. There are several procedural differences. The burden of proof with respect to some issues is on the carrier in a section 15 case, that is the one that would be instituted in advance of the rates' effectiveness. On the question of whether the rates are reasonable, that is are they high enough or too high, the carrier there bears the burden of going

forward with the evidence. As to other issues, the burden remains the same. In either proceeding, the burden of going forward with initial showing on questions such as discrimination or violations of the long-and-short haul clause, which are the issues that we have in this case, rest with the shippers.

There are some differences in the result of a proceeding. In a section 15 proceeding, the commission may order refunds if it finds that the rates are unjustified. In a section 13 proceeding, the result is damages in favor of the shipper if he can demonstrate that he has been financially injured by the unlawful rate. And there are slightly different statutory time limits that govern the proceedings. Under section 15, the Commission is under an obligation to complete the proceeding in seven months, with a possible three-month extension. There is not that same statutory limit in a section 13 proceeding, but there are some internal -- some procedural limits within the proceeding itself.

QUESTION: Mr. Evans, can you help me on one perhaps awfully narrow question. Under a section 15 proceeding, and focusing on the word "investigate," does the word investigate refer to what the Commission should do before it decides whether or not to suspend, or does it refer to the examination made after there is a suspension?

MR. EVANS: It refers to the examination made after the suspension or after the decision to investigate. That is critical to this case because the Court of Appeals as I mentioned characterized what the Commission did here as a premature termination of an investigation. The term "investigation" as it is used in the statute -- the statute has been recodified, the word is now "proceeding" -- what it means is the process that can lead to a final judgment on the final order of the Commission adjudicating the lawfulness of the rates.

QUESTION: Well, doesn't it always follow that if the Commission has decided not to suspend, it has also necessarily decided not to investigate?

MR. EVANS: No, quite the reverse, Mr. Justice. In order --

QUESTION: Then your answer was misleading, your first answer to my Brother Stevens.

MR. EVANS: I'm sorry.

QUESTION: That is what has got me confused.

MR. EVANS: I'm sorry. The decision of whether to investigate and suspend is simultaneous. A rate is filed, it is up to the Commission in response to protest to decide whether first of all to conduct an investigation into the rate. If it decides that it will investigate at that stage, before the rate's effectiveness, it may but

need not also suspend the effectiveness of the rates for up to seven months.

QUESTION: So an investigation may be for the purpose of determining whether or not to suspend?

MR. EVANS: No. Maybe I am not being clear. The suspension happens at the outset. A suspension is basically an injunction, a temporary injunction pending a final decision. The final decision is the result of the investigation. The suspension carries with the investigation and terminates at the end of the investigation.

QUESTION: But there must be some ratiocination leading to a decision of whether or not to investigate?

MR. EVANS: Yes, it is a very rapid, necessarily so, very rapid decision at the administration stage. The rates come in, the tariffs come out -- I brought along some tariffs just so you could see what we are talking about.

QUESTION: And protests come in, don't they?

MR. EVANS: -- protests come in -- tariffs have to be filed with at least 30 days notice.

QUESTION: Right.

MR. EVANS: A tariff comes in, a protest must be in under the rules by twelve days before the effective date. The carrier can reply to the protest by the fourth working day before the effectiveness of the rate. By the

third working day before the effectiveness of the rate, the Commission's suspension board makes a judgment whether it will investigate and suspend or investigate or suspend.

QUESTION: There has to be some sort of an appraisal, doesn't there?

MR. EVANS: There is an appraisl. It is a very rapid informal assessment. It is not, in answer to Mr. Justice Stevens' question, an investigation is that phrase as used within the statute.

QUESTION: But you still have me confused about one thing. It still seems to me that if the investigation under the statute is the post-suspension proceeding, necessarily a decision not to suspend would include a decision not to investigate.

QUESTION: Yes, isn't it?

MR. EVANS: I am not making this clear, I guess. The decision -- let me put it this way: It is possible for the Commission to investigate without suspending. It cannot suspend without investigating. In other words, the suspension -- the purpose of the suspension is much like a preliminary injunction. You are holding the rate off while you are investigating. If you have no investigation, there is no reason to suspend, there is no foundation for a suspension.

QUESTION: There are two kinds of investigations,

in other words?

MR. EVANS: Yes -- I'm sorry?

QUESTION: The word investigate under the statute can refer to two different kinds of investigations, one, a post-suspension investigation, and alternatively an investigation without --

MR. EVANS. Without suspension, precisely. It is the same investigation. It is just in one case the Commission feels it necessary to hold the rate from being effective, and in the other case it is willing to let it come into effect.

QUESTION: Since you analogize it to an injunction, is it the same, broadly the same kind of discretion to be exercised by the board as a court of equity would exercise?

MR. EVANS: Even broader, I believe, Mr. Chief Justice. There are no statutory standards that govern the exercise of the suspension and investigation authority. The statute is simply the Commission may investigate and may suspend. There are very clear statutory standards that come into play in response to a section 13 complaint. There the Commission must investigate, it has no discretion unless it finds that the complaint is completely without substance.

QUESTION: You say that the discretion is broader

in part because they have an absolutely fail-safe way of protecting everybody?

MR. EVANS: In effect, that is right. A shipper who seeks unsuccessfully to have a rate investigated at the outset can just turn around the next day and file a complaint and secure an investigation. He can compel it. What the respondents in this case did was go to court. They could have simply filed a complaint with the Commission the next day and the investigation probably would be over by now. The Commission's discretion at that stage is even broader than a court's because it is not limited to questions of likely harm and so forth. That is clearly part of the suspension board's consideration. They consider questions like is it likely that this rate is going to be found unlawful, is it likely that the public is going to be significantly harmed. But it also takes into account things like the availability of Commission resources for the investigation, and it takes into account things like the overriding congressional policy that the Commission found decisive here.

QUESTION: Let me ask you one other question. If there is an investigation pursuant to section 15, not section 13, the burden I take it is on the carriers to demonstrate the lawfulness of the rate?

MR. EVANS: It is a little bit narrower than

that, Mr. Justice. The burden is on the carrier to demonstrate the reasonableness of the rates. Now, there are other issues embraced with the phrase "lawfulness."

QUESTION: But my other question was, in such a proceeding are reparations a possible form of relief?

MR. EVANS: Well --

QUESTION: Assume at the end of the proceeding it was determined that the rate had been unreasonable and excessive.

MR. EVANS: In a section 15 case --

QUESTION: A section 15 case.

MR. EVANS: -- the remedy is normally refunds. In fact, the statute requires refunds.

QUESTION: I see.

MR. EVANS: If the Commission finds that the rates were unjustified. Now, that doesn't always happen. Sometimes the Commission can find that the rates were not shown to be just and reasonable, were not shown to be lawful, in which case the remedy might not be refunds. But refunds are an available remedy.

The Court of Appeals in this case went wrong, I believe, for basically three reasons. First, we have discussed, it characterized the Commission's decision in this case as a termination of investigation. In fact, the investigation was never begun. That is critical

because in this Court's decision in the City of Chicago case, that distinction was of decisive significance. The Court held there that a Commission decision terminating an investigation of the unlawfulness of a train discontinuance was reviewable because it was a decision on the merits, just like any other decision on the merits. At the same time, it stated in that case the corollary principle that the Commission need not institute the investigation. That matter, according to the Court, was a matter committed to the agency's discretion and not reviewable.

The second error the court made was that it seemed to think that section 13, the complaint procedures under section 13 would not be available for certain categories of claims. That is just not the case. Any issue of the lawfulness of the rates can be raised in a section 13 complaint just as it could in a section 15 proceeding.

And finally it believes that the decision of the Commission not to investigate was tantamount to a finding that the rates were lawful, and that is not the case. This Court held as much in the first SCRAP decision, that refusal to investigate leaves the rates fully subject to complaint and investigation and forecloses no argument as to the lawfulness.

I began to point to these tariffs I brought along here to illustrate the kind of thing the Commission deals

with. I asked the tariff people to give me a sampling, a big one, a medium one, and a little one. That is one tariff (illustrating). That is about average, I am told, the middle one. That is a small one (illustrating). The Commission receives 52,000 of these a year, roughly, and it considers for suspension and investigation in response to protests a far smaller number. But even so, there are within each tariff maybe one or two but as many as thousands of individual rate changes. This is a mammoth undertaking.

The Commission examines all the tariffs that it receives and when it receives protests it considers the issues of lawfulness that are raised. But these are the kinds of judgments that are being made rapidly in the face of a day after getting the railroad's reply. They are the kind of judgments that are made basically from gut, because it is just impossible to deal more effectively at that stage than from the gut. And in our view, that is not the kind of a decision that the courts are very well equipped to undertake review of.

There are a number of --

QUESTION: Mr. Evans, I assume that your position in the Court of Appeals, that is the ICC's position is different than that taken by the Department of Justice there?

MR. EVANS: Yes, the Department of Justice argued there that the decision of the Commission was reviewable then, right there in that court. In fact, much of the Court of Appeals opinion is a reflection of the brief that was submitted by the Department of Justice in that case. We have been consistent.

QUESTION: Did the government just develop its esoteric theory in this Court?

MR. EVANS: Yes.

QUESTION: It is quite different from its position below.

MR. EVANS: Quite different, yes.

QUESTION: I take it from your answer to Justice Rehnquist that you think it is esoteric.

MR. EVANS: Well, I --

QUESTION: Archane.

MR. EVANS: -- I hesitate to embrace the adjective, but it certainly has appeal. I just wanted to make --

QUESTION: You wish you had thought of it yourself?

MR. EVANS: Pardon me?

QUESTION: You wish you had thought of it yourself?

MR. EVANS: Yes. I had a few others. The one

I used was curiously cumbersome.

I just want to make one other point and that is that the respondents' arguments here really hinge on a notion that these rates are patently obviously ridiculously unlawful and their whole argument hinges on the Court's willingness to make that finding. It is really trying to drag -- they are really trying to drag this Court into the merits of the case even before they have given the Commission an opportunity to address those merits finally.

There is doubt about the lawfulness notwithstanding what they will tell you and I respectfully suggest that the Court need not enter the matter until the Commission has spoken.

Thank you.

Ms. Poynter.

ORAL ARGUMENT OF WANDALEEN POYNTER, ESQ.,

ON BEHALF OF THE PETITIONERS IN NO. 78-604

MS. POYNTER: Mr. Chief Justice, and may it please the Court:

As a representative of the railroads, I would like to approach essentially and very emphatically the overriding public policy problems as well as the congressional mandate avoidance problems, if you will, that we will face if -- and I do adopt completely the position that the Commission has taken in this regard that the

court below has simply intruded, it is a classic example of an intrusion into an administrative proceeding. They absolutely took this case, they entered a suspension as only the Commission has the authority to do under 15(8), and as this Court has held emphatically completely apart from court interference. They then proceeded to take every step available under section 15(8) to the Commission. They made a determination on the weight of the evidence, they issued a refund order, and they then proceeded to set an investigation. They literally remanded to the Commission and said to the Commission, you will investigate and you will make findings on two specific areas.

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act and within that, as the Commission has indicated, were provisions which drastically changed the rate-making regulation allowed to the Commission and in most instances definitely decreased the authority that the Commission had to step in, especially at a pre-effective stage to literally interfere with railroad-made rates.

Carrier initiation of rates is an absolute. There is only the suspension stage which interferes with carrier initiation of rates. One of the provisions was a provision allowing the publication of demand sensitive rates. The allegations which have been made of patent

illegalities by the protestants were desperate attempts, literally eleventh hour attempts on the part of one of the protestants simply to get before a court to avoid the restrictions that have been placed by Congress within 15(8), including -- and I address a question which was initially requested of Mr. Evans -- the suspension stage is more like a petition for a stay to a court at this particular time than it was prior to February of 1976, because indeed now a complainant to the Commission requesting that a rate be suspended or investigated or both must show that there is a possibility of substantial harm and that there is a likelihood that the complainant will prevail on the merits.

Neither of the complainants represented before this Court today did that. In seeking appeal to the Eighth Circuit, the complainants in essence avoided their recourse through the Commission and misled the court in a sense by requesting suspension on patent illegalities when it had not been proved to the Commission. The court below misconstrued what the complainants were saying to the court, and that is where we find ourselves today before this Court.

If the lower court decision is not reversed, it literally will open flood gates to allow shippers to avoid the restrictions that have now been placed against them by

Congress by allowing what is equivalent to a pre-1910 situation where the courts will be telling the Commission when they will and when they will not investigate and in what time.

The most compelling example of this is the position represented to this Court today by the Chicago Board of Trade and its co-responding parties. They have simply alleged simple violations of two sections of the Interstate Commerce Act which deal with discriminatory or prejudicial practices, most definitely areas with which only the Commission is qualified to act.

If the lower court decision is upheld, it will only be necessary for a complainant to go before the Commission and to make any allegation of patent illegality and then put that before an appeals court for the court to decide whether they have raised a substantial question or not, not to allow the Commission to make that determination.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Ms. Pynter.

Mr. Allen.

ORAL ARGUMENT OF RICHARD A. ALLEN, ESQ.,

ON BEHALF OF THE RESPONDENT, UNITED STATES

MR. ALLEN: Mr. Chief Justice, and may it please the Court:

The United States in this case is urging a position

that agrees in some respects and disagrees in other respects with both sides in this controversy.

First, we agree with the Commission that the Court of Appeals did not have jurisdiction to review the Commission's decision in this case essentially because in our view the Commission's decision was not a final decision, that is reviewable under the Administrative Procedure Act, and because the complaining shippers had not exhausted their administrative remedies. In that respect, we disagree with the Court of Appeals and with the complaining shippers.

Second, however, we disagree with the Commission's position that its decision not to conduct an investigation under section 15 is never judically reviewable. We submit that that decision may be judicially reviewed after the Commission has made a final decision on the lawfulness of rates under a section 13 proceeding that any aggrieved shipper can compel the Commission to undertake under the statute.

QUESTION: Do we need to decide that in this case? Is it inevitable that we must decide it?

MR. ALLEN: I think, Mr. Chief Justice, it is inevitable that you decide it or I think it is directly --

QUESTION: In this case?

MR. ALLEN: In this case -- perhaps not absolutely

necessary, but in order to determine and to conclude, as we submit you should, that the Court of Appeals had no jurisdiction in this case, there are two alternative theories for accepting that. The first theory is the Commission's theory that this is simply one of those kind of agency actions that is committed to agency discretion by law and therefore under the Administrative Procedure Act is wholly immune from judicial review at any time.

The other position is our position, which is quite different, which is that it is not one of those kinds of actions but, rather, the Court of Appeals lacked jurisdiction on finality principles and failure to exhaust administrative remedies.

Our position is based on our view that under the particular scheme of the Interstate Commerce Act, the principle consequence of the Commission's decision not to conduct an investigation under section 15 is to shift the burden of proof on the question of the lawfulness of rates from carriers, where it would be under section 15, to shippers where it would be under section 13. That consequence is expressly provided for by in the Act and it is an important aspect of the scheme of the Act, as this Court has recognized in a number of decisions.

If the Commission conducts an investigation, decides to conduct an investigation under section 15, that

section expressly provides that the burden of proof is on the carrier to show that the proposed change in rates is just and reasonable. If the Commission does not investigate under section 15, any aggrieved shipper can file a complaint under section 13 and compel the Commission to adjudicate the lawfulness of the rates, but in that case the burden is on the complaining shipper to show that the rates are unlawful.

I would like to state briefly our reasons for agreeing with the Commission that the Court of Appeals was wrong in reviewing this case and devote the preponderance of my time to the point in which we disagree with the Commission.

The Commission's decision not to investigate under section 15 was not reviewable by the Court of Appeals in our view because it was not a final decision within the meaning of the Administrative Procedure Act and within the meaning of 28 United States Court, section 2342(5), which gives the Courts of Appeals jurisdiction to review final orders of the Commission.

Contrary to the Court of Appeals, the Commission's decision not to investigate under section 15 did not constitute either expressly or in effect a determination on the lawfulness of the proposed rate change. The statute gives shippers an adequate remedy in section 13 to compel the Commission to decide the lawfulness of the rates and

the Administrative Procedure Act and principles of exhaustion of administrative remedies require shippers to use and employ that procedure before they can invoke judicial review.

QUESTION: You don't think that Arrow and SCRAP then are the cases that control this particular aspect of the case?

MR. ALLEN: No, Mr. Justice Rehnquist, we do not because we do perceive a distinction between the review of a decision not to investigate and the review of a decision not to suspend a rate. In Arrow and SCRAP, the Court explained that decisions of the Commission not to suspend a rate were not reviewable but for very particular and persuasive reasons that were evident in the statutory scheme.

QUESTION: The Congress just hadn't intended them to be.

MR. ALLEN: Congress had not intended them to be reviewable because the suspension power itself was enacted to prevent the practice that had previously occurred of District Courts enjoining rates and therefore creating a great disparity in rates contrary to the national transportation policy.

QUESTION: Well, wouldn't it follow, if Congress had not intended review of the suspension power, it would

likewise not have intended review of the authority to investigate preliminary to suspension?

MR. ALLEN: We believe not, Mr. Justice Rehnquist, as Mr. Evans explained. The power to investigate is not necessarily a power preliminary to a decision to investigate. It is a power that is exercised at the same time or even independently. The Commission can refuse to suspend a rate and nevertheless investigate its lawfulness under section 15, in which the carriers have the burden of proof. They can suspend a rate and still investigate under section 15. It doesn't conduct the investigation before it decides whether to suspend or not to suspend.

QUESTION: I suppose there is something in the nature of or at least analogous to probable casue that enters into the thinking at that stage?

MR. ALLEN: Perhaps analogous, perhaps analogous. There are circumstances, as I will explain in a minute, in which there can be easily imagined they are not extremely far fetched in which the Commission's decision not to conduct an investigation would be we think plainly contrary to the statute or plainly arbitrary and capricious. We have given some examples in our brief. But for the present let me outline the precise reasons that we disagree with the Commission's position.

As I said, we agree that the Court of Appeals did not have jurisdiction to review this case. Now, the Commission goes further and contends that its decision not to investigate is never subject to judicial review even after a final decision by the Commission on the merits of the lawfulness of rates, because in the Commission's view the decision not to investigate is one of those actions which under the Administrative Procedure Act is committed to agency discretion by law and therefore wholly unreviewable, according to the logic of the Commission's position, therefore it believes that its discretion not to investigate is analogous to the discretion of a public prosecutor not to investigate or prosecute someone for violations of criminal law. With that proposition, we strongly disagree.

And I would like to emphasize two points in connection with our disagreement. The first is that we believe that the Commission's position is contrary to general and important principles that this Court has established determining the availability of judicial review of the administrative action.

The second point I want to make is that while it may be that there will not be a practical difference or that there will be little practical difference between our position and the Commission's position in most cases, there may be some cases in which it is a significant practical

consequence, and we believe that an example of the kind of case where it may make a difference has already been before this Court in the Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade case, 412 U.S., and is discussed in our brief at pages 35 through 37.

With respect to the first point, this Court has established and it has stated in many cases that the Administrative Procedure Act establishes a strong presumption in favor of judicial review of administrative action, and there are only two circumstances in which review can be precluded, first, where a statute expressly precludes review or, second, where the statutory scheme provides some particular and persuasive reason why review would not be appropriate.

In this case, so long as review is deferred until after a Commission decision on the merits of rates under section 13, which is reviewable in a court in any event, there is nothing in the scheme of the Interstate Commerce Act that would indicate that that review of the no investigation decision is inappropriate, and the Commission has cited nothing in the purposes or procedures of the Act that would be undermined by review of a no investigation decision in the context of the normal judicial review of final Commission decisions. Accordingly, we think that rejection of the Commission's position is impoartant as a matter of

general principles.

With respect to my second point, there may be, as I have said, little practical difference between our position and the Commission's in most cases. We believe that -- we think that the Commission's discretion in this matter is quite broad, although not unlimited, and there may be and probably are very few cases in which a court could ultimately find that the Commission had abused its discretion in not investigating a rate and yet in which at the same time the Commission in a section 13 proceeding found that the complaining shippers had not met their burden of showing that the rates were unlawful.

QUESTION: You have to equate action and non-action to sustain your position, don't you?

MR. ALLEN: Yes, you do, Mr. Chief Justice, and I think this Court has equated action and non-action in the past. I think the Chicago Board of Trade case can be viewed as an example of that. In any event, there is no principle which I can perceive for saying that action and non-action are different in terms of judicial reviewability.

QUESTION: Mr. Allen, is there a time within which a section 13(1) proceeding must be commenced?

MR. ALLEN: No, not in the statute.

QUESTION: So under your analysis a decision not to investigate never becomes final unless such a proceeding

was sometime or other commenced, because there would always be a potentiality that such a proceeding could be commenced and terminated and that would have the effect of making final the earlier decision by the Commission not to investigate. That is your theory, isn't it?

MR. ALLEN: In a sense I suppose that is true, although it is very far-fetched and unrealistic, a case in which it might be that a section 13 proceeding was initiated years after the Commission had declined to investigate the tariff over the protests of complaining shippers.

QUESTION: I suppose it is about equally probable as -- you say there is little practical difference between your position and --

MR. ALLEN: Probably in most cases, but it is by no means far-fetched to imagine cases in which it might be of practical significance. We have given examples in our brief, hypotheticals where the Commission fails to investigate for solely and for manifestly erroneous legal reasons or because, for example, they --

QUESTION: Isn't there another way to dispose of this case, assuming either you or the ICC is correct, is along the lines suggested by the Chief Justice, to say that even assuming that the matter is not entirely committed to the discretion of the Commission, nevertheless the order was plainly not final and we don't have to reach the question.

MR. ALLEN: Yes, I think the Court could do that and we would agree that it has --

QUESTION: So it really isn't necessary to decide the difficult question you argue.

MR. ALLEN: It is not necessary to decide that question. We would be perfectly happy with a decision that says whatever the ultimate reviewability, it is not final at this time.

QUESTION: You just want to keep your foot in the door for a future development.

MR. ALLEN: Whether or not that would be appropriate as a matter of sound judicial administration is more your question than mine.

QUESTION: Even if your foot isn't in the door, you would like to have the door left open.

MR. ALLEN: Well, certainly that is true, too, Mr. Justice.

My last point though is that it is not far-fetched to imagine such cases and in our view a good example is the situation that has already confronted this Court in the Wichita Board of Trade case. And although the posture of that case was somewhat different, we think that it does stand in principle for the proposition that we support, namely that no investigation decisions are subject to judicial review for an abuse of discretion. We have

discussed that case in our brief and I rely on that discussion, unless there are any questions from the Court.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Caldwell.

ORAL ARGUMENT OF JOHN H. CALDWELL, ESQ.,
ON BEHALF OF THE RESPONDENTS, SEABOARD
MILLING CORPORATION, ET AL.

MR. CALDWELL: Mr. Chief Justice, and may it please the Court:

The respondents feel as if there are two separate cases that are being presented to this Court -- or maybe three cases, the case being argued by the United States, the case being argued by the railroads and the Commission, and the case which we presented to the court below which we argue before this Court.

The ICC and the railroads are before this Court in an abrupt change of its position, the United States, have all repeatedly mischaracterized this case as only involving a routine normal determination not to suspend or investigate under section 15(8). What happened, however, was a far different situation.

What happened was an unprecedented abuse of statutory authority in the form of Commission action taken in opposition to the clearly stated requirements of section

4(1) and contrary to the absolute prohibition of that section in that rates were approved to become binding and effective and harmful on all segments of the public without compliance with the clearly stated requirements of section 4.

Now, what this case is is an abuse of statutory authority of an unprecedented nature under section 4(1), an example of statutory misinterpretation by the Commission that approval of rates as effective and binding on a final basis and an issuance of orders notably lacking an irrational basis or findings.

What the case is not is --

QUESTION: This point that you just made, not the one that you are just about to make, is it something that would be apparent on the face of the proceedings?

MR. CALDWELL: Yes, it is, Your Honor. It is apparent from the face of the orders that were issued by the Commission and reviewed by the court in that the Commission failed to resolve the allegations that the rates on their face were patently illegal and could not be permitted to be put into effect --

QUESTION: Is that allegation one capable of being resolved simply on the face of your protest without some sort of investigation?

MR. CALDWELL: It can be easily and could have

been easily resolved by a mere examination of the face of the tariffs that had been filed by the carriers with the railroads and should have been resolved when the allegation was made by our side that the rates on their face should not be allowed to take effect because they were substantively a nullity in that they contained long-and-short haul departures.

Now, there is a distinction between the kind of appraisal I just referred to and a subsequent 15(8) type of investigation. Our position in this case is that the automatic prohibition of section 4(1) was triggered when we made our allegation and provided substantial examples that the tariffs on their face were invalid.

QUESTION: Okay. You use the words "substantial examples that the tariffs on their face were invalid." Is it your position that the ICC could simply by having looked at the tariffs and looked at the section of the statute you rely on concluded without any further factual investigation that the tariffs were invalid?

MR. CALDWELL: That is absolutely correct, Your Honor. The statute, section 4(1), prohibits the establishment of tariffs that contain on their face this mathematical relationship of longer or greater charges for shorter distance and longer distance over the same route of haul.

In effect, the Commission ignored the statutory

prohibition. It was a very simple and very easy task for it to have its tariff people to simply look at the tariffs, even in the absence of any demonstrated violations documented such as we have documented and quickly have determined that these tariffs contain long-and-short haul departures. Instead, the Commission merely turned its head and said that it would not reject and it said it would make no findings and leave unresolved the question of whether on their face these tariffs were substantively invalid in violation of the clearly stated prohibition.

QUESTION: How many pages did the tariffs consist of?

MR. CALDWELL: I don't know, Your Honor, the exact number of pages, but it was not a substantially difficult job for the Commission to evaluate the tariffs. As a matter of fact, the pleadings which were evaluated by the Commission in this case were about half the size of the yellow pages of the Washington phone book. If the Commission was capable of analyzing and digesting that material, it certainly could have had its tariff people look at the tariffs.

QUESTION: You mean the pleadings were half the size of the yellow pages of the Washington phone book?

MR. CALDWELL: This was the approximate size of the pleadings that were filed and resolved and digested by

the Commission prior to its action authorizing the tafiffs to take effect. This is the appendix --

QUESTION: They are supposed to do that in four days?

MR. CALDWELL: They do it in -- in this case, Your Honor, they did it in I think a little more than four days, but they -- this is not an unusual section 4(1) prohibition. We provided specifically uncontroverted examples that on the face of these tariffs they contain violations of the clause.

QUESTION: As I understand, the Commission still doesn't agree with you on that.

MR. CALDWELL: Your Honor, neither the Commission nor the --

QUESTION: Do they or not?

MR. CALDWELL: I don't know what the Commission's position is.

QUESTION: Well, they haven't agreed with you --

MR. CALDWELL: They haven't agreed that there were violations --

QUESTION: They haven't agreed with you, even after all this time, after reading everything you've ever said about it, they still haven't agreed with you.

MR. CALDWELL: Because apparently they have never had their tariff people look at the face of the

tariffs. They haven't denied our position. The Commission and the railroads have not denied that these rates contain violations on their face.

QUESTION: Mr. Caldwell, if it is all that clear, could you not file a 13(1) proceeding and get prompt relief?

MR. CALDWELL: No, sir, we could not, Your Honor, for a number of reasons. First of all, the Commission does not grant refunds in section 13 proceedings for violation by itself of its own statutory mandate. It simply will not do that.

QUESTION: It concedes that there is no --

MR. CALDWELL: We could not have obtained the sort of review we sought in the court here by submitting a section 13 complaint. The Commission would not agree in that proceeding that it had allowed illegally established tariffs to become effective. That would have been a futile exercise on our part. Secondly, the Commission historically does not grant refunds in section 13 complaint cases for section 4 violations of the Act.

QUESTION: You are saying it is perfectly obvious there is a violation, but you are saying because the Commission exercises discretion not to suspend and not to investigate, even though the patent violation were disclosed to the Commission, as a matter of pride would they rule that way? Why would they rule that way if --

MR. CALDWELL: As a matter of case history, the Commission takes the position that over-charges and refunds cannot be established in a section 4 proceeding. In their reply brief, Your Honor, they even state that over-charges are alien -- and that is the word they use -- alien to the concept of a section 13 complaint proceeding. Historically, the Commission takes the position that if you file a section 13 complaint, you must establish that the rates are unreasonable and violate some other section of the Act beyond section 4. So even under their own case precedent and long-established history, by processing a section 13 complaint case we could have obtained no relief.

QUESTION: Well, both the United States and the Commission have represented to us that the issue you want to raise would be open in a section 13 proceeding, and you are telling us they are misrepresenting the --

MR. CALDWELL: That's correct, they are. They are misrepresenting in the sense that we could obtain refunds for over-charges in a section 13 complaint case, and we so cited cases to that effect.

QUESTION: Well, if this is your objection, the United States position would take care of you.

MR. CALDWELL: No, sir, the United States --

QUESTION: Because they would go back and say that they should have investigated.

MR. CALDWELL: The United States position is that we would now have to file section 13 complaints and then if we were unsuccessful we would have to go back to court and at that time obtain a review of the failure to investigate and --

QUESTION: They would say that the decision not to investigate was wrong and that would put you back in the position as if the Commission had been investigating. If the Commission had investigated here and found the rates shouldn't be filed but hadn't suspended them, there would be a refund.

MR. CALDWELL: If they had investigated and had not suspended, there would have been refunds available.

QUESTION: Exactly.

MR. CALDWELL: Assuming that the allegations had ultimately been established. But our point, Your Honor, is that this is not a section 15(8) case involving Commission discretion to suspend or to investigate. This is a section 4 case, of the type decided in the Mechling decisions of this Court and the type decided in the Seaboard Allied case before the Western District of Missouri, where the Commission is violating on the face of the statute, the prohibition by refusing to reject or suspend or, for that matter investigate tariffs that were invalid on their face.

Now, I think the important thing the Court must

understand is that in a very coy way the railroads have never denied that these departures exist. They are either in the tariffs or they aren't in the tariffs. The railroads have the obligation to clear them out of the tariffs before they file them or file special applications for pre-effectiveness permission to make those tariffs effective. The carriers have never denied that these departures exist on the face of the tariffs, nor for that matter has the Commission made such a denial.

Now, this case had other unusual aspects about it beyond the fact that it involved a section 4(1) prohibition. It involves a special increase under a specially delegated power from the Congress in section 15(17). It involves rates that were proposed at a time of the year when affected shippers had no alternative but to pay the rates and ship and suffer the injury that was caused by the unlawful rates. There was a unique method of processing the case by the Commission, contrary to the normal 15(7) or 15(8) type procedure. The Commission established a formal docket number and assigned it to the case. It assigned the case to processing by the full Commission and by Division 2 of the Commission. And finally and most importantly, it issued two formal written orders in which it purported to make findings on various issues but in effect brushed aside the section 4(1) issues.

It is our position that the Commission in effect has abrogated its responsibility in enforcing section 4(1) and that this was found by the lower court and was the reason why the lower court ordered the case back to the Commission for completion of the investigation.

I want to emphasize that the investigation the Commission should have made was one prior to allowing these rates to take effect. They were not self-executing, they could not be allowed to take effect until these departures were either cleared out of the tariffs or the carriers obtained permission for those violations.

QUESTION: Do you say this court intervention is permissible only when a violation of 4(1) is claimed?

MR. CALDWELL: I would say it is permissible whenever there is a statutory violation, and I would say that the court should have the power to intervene whenever the Commission is violating either its own regulations or an organic statute which occurred in this case.

QUESTION: Well, you can allege that at any time.

MR. CALDWELL: We can allege it and I am not suggesting that the court would intervene.

QUESTION: But it has no power to intervene if it --

MR. CALDWELL: Only in the event a valid showing has been made.

QUESTION: Well, valid, substantial -- you know, words can be bandied about.

MR. CALDWELL: No, Your Honor, we are not talking in terms of the semantics involved. The mere fact we made these allegations and called them patent is not the determining fact. The determining fact is what the Commission did in response to the allegations. It in effect refused to make any finding. It left the allegations undetermined.

QUESTION: Well, what --

MR. CALDWELL: The Commission had to alternatives. The first one --

QUESTION: Let me ask you, what if the Commission thought the allegation were simply frivolous and said nothing about them?

MR. CALDWELL: They could have said that they thought they were.

QUESTION: Well, it could have said nothing, but they thought they were frivolous.

MR. CALDWELL: They could not do that under section 4 without violating the congressional intent that rates of this type not be allowed to take effect.

QUESTION: Well, what if they --

MR. CALDWELL: The Commission was dealing with a different section than it normally deals with in a section 15(8) case, and that section makes clear that the Commission

has no discretion to leave unresolved allegations that there are facially invalid rates that have been filed. This is not a section 15(8) case in its normal context.

QUESTION: Well, what is its standard under your view?

MR. CALDWELL: The standard is the standard that Congress established in section 4(1).

QUESTION: I know, but would you say the Commission, when these allegations are made, should have said, well --

MR. CALDWELL: The Commission has a couple of alternatives, Your Honor. The first is to say that we find the allegations, let's say, frivolous or incorrect because no section --

QUESTION: Well, what if they just say, well, it is about evenly balanced, so they are arguable?

MR. CALDWELL: It is like a little bit of pregnancy, it is not evenly balanced. There is no way that you can evenly balance it. The rates maintain the departure and --

QUESTION: Well, sometimes aren't all that clear about what a statute means --

MR. CALDWELL: Well, with all due respect, in this case --

QUESTION: -- and sometimes the Commission and

other agencies have changed their mind and then have upheld on both occasions.

MR. CALDWELL: Your Honor, those cases I am unaware of, if they are under section 4(1). Section 4(1) is absolutely crystal clear. It doesn't leave any room for discretion or application of transportation judgment by the Commission unless it acts on an application submitted prior to making the rates effective and determines that a special case has been made.

QUESTION: What about reparations, don't the reparations take care of curing the unwanted condition?

MR. CALDWELL: They do not, Your Honor, because, as I earlier indicated in response to Mr. Justice Stevens, the Commission will not grant refunds. It would grant reparations only in the event a shipper could establish unlawfulness under other sections of the Act, other than section 4, and the Commission's cases clearly show that it does not grant refunds or over-charges where illegally established rates in violation of section 4(1) have been filed.

QUESTION: Mr. Caldwell --

MR. CALDWELL: Our position here is that this is a Commission violation. In other words, we can't be required to go to the Commission fairly and have adjudicated the Commission's violation of its own statute. This is a

leading --

QUESTION: Mr. Caldwell --

MR. CALDWELL: -- sort of situation and not a normal 15(8).

QUESTION: Mr. Caldwell, you described some patent violation in the long-haul short-haul relationship of rates and your opponent, the ICC, pointed out that these tariffs are quite large and may contain thousands of changes in rates. Roughly how many changes are there in this tariff and how many violations do you think are patent? Is it like 1 percent of it or 50 percent of it?

MR. CALDWELL: The gentleman who did the checking of these tariffs for us called me at home last night and said that he stopped counting at 500.

QUESTION: Out of how many?

MR. CALDWELL: Out of the various points involved and I don't know how many --

QUESTION: Hundreds of thousands?

MR. CALDWELL: Not hundreds of thousands, possibly thousands. There is a good chance that there were thousands of violations in --

QUESTION: And how many did you identify in your pleadings?

MR. CALDWELL: We identified in our pleadings before the Commission five specific documented examples

showing the tariff rate, showing the points involved, showing the actual rates that were paid.

QUESTION: You identified five specific examples out of several thousand.

MR. CALDWELL: And we said they were illustrative of hundreds. We made that allegation. Our point is, Your Honor, had we not even made that allegation, documented it, the Commission had an obligation to at least look at the allegation and tell us we were right or wrong. It was very simple. The Commission, Mr. Justice White, all it had to do was issue an order saying we find the allegations frivolous or incorrect, for the following reasons.

QUESTION: So you say that any time you allege a statutory violation, whether it is 4 or some other statutory violation, the Commission must adjudicate it in its suspension proceeding?

MR. CALDWELL: On our position, Your Honor, our position is that where the --

QUESTION: They must investigate and adjudicate it?

MR. CALDWELL: Our position is not if any allegation whatsoever is made that the rate might have some unlawfulness in it, that the Commission must --

MR. CHIEF JUSTICE BURGER: We will resume at 1:00

o'clock.

(Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.)

AFTERNOON SESSION -- 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Caldwell.

MR. CALDWELL: Thank you, Mr. Chief Justice.

I would like to take the remaining amount of time to answer a question that was raised by Mr. Justice White before the recess and also deal on a few other remaining points.

Mr. Justice White inquired whether under our interpretation of the statute it would be necessary for the ICC to issue or render findings on any violation alleged in the Interstate Commerce Act. That's not our position.

The point here, Your Honor, that this is not just an allegation of unlawfulness that can be rendered or determined in a post-effectiveness investigation. This was an allegation that the tariffs were not -- could not be allowed to take effect because of the clear language of section 4 which proscribes any of those tariffs from becoming effective --

QUESTION: Well, any allegation which would have that effect, you say the ICC would have to rule on?

MR. CALDWELL: Our case is based on the section 4 prohibition --

QUESTION: Yes?

MR. CALDWELL: -- which is organic to the

Interstate Commerce Act, and to that extent the Commission cannot let rates take effect which contain those violations on their face. Now, as far as other violations of the Act are concerned --

QUESTION: Are you saying that they could not -- are you saying they just had to investigate or that they could not refuse to suspend?

MR. CALDWELL: They should not have permitted the rates to take effect.

QUESTION: So you are saying --

MR. CALDWELL: They should have either rejected or suspended, but at a minimum they should have ordered a section 8 investigation --

QUESTION: Are you saying --

MR. CALDWELL: -- to determine if the allegations were valid.

QUESTION: Their refusal to suspend then is reviewable for the same reason as well as --

MR. CALDWELL: That's correct.

QUESTION: Well, I --

MR. CALDWELL: But that issue may not be reached in this case because the lower court was not reviewing the no suspension decision but the no investigate decision. So the question of whether the court could intervene --

QUESTION: Well, what if you were wrong on your

argument with respect to the refusal to suspend? What if the Commission could refuse to suspend despite your allegation of a section 4 violation, what would you say, the Commission nevertheless erred in refusing to investigate?

MR. CALDWELL: Yes, we would say that, Your Honor. They should have suspended or rejected because of the obvious prosecription in section 4(1) and the court should be allowed to intervene to correct that unlawfulness, but short of that the Commission should have investigated if it had any doubt in its mind that these violations existed in the face of the tariffs.

QUESTION: Isn't judicial review of refusal to suspend covered by Arrow and SCRAP?

MR. CALDWELL: Refusal to suspend in the sense that the agency is acting within its discretionary judgment, Your Honor, or applying transportation judgmental factors to the record. It was not obliged to do that here. This was an abuse of statutory authority that comes within the exception to the Arrow rule as recently announced by this Court in the Taps case in the opinion written by Mr. Justice Brennan. So what we are asking here is that the Court examine this case in light of the exception to Arrow and SCRAP recently announced in the Taps case as well as left for remaining determination in Footnote 22 in SCRAP I, in which the Court held at that time that it would leave

for future determination whether or not exercise or failure to exercise the suspension power was an abuse of statutory authority.

Now, with respect to the patent --

QUESTION: That was in Leedom v. Kyne, wasn't it?

MR. CALDWELL: Yes, sir, and other such cases allowing judicial intervention when there is a clear abuse of statutory authority.

QUESTION: Right.

MR. CALDWELL: Now, with respect to the question of whether or not the tariffs contained departures, I call your attention to the reply by the railroads at page 272 of the joint appendix as opposed to their later reply at page 292 of the appendix. In the first reply, they provided a tariff citation and a specific demonstration that there was not a departure. And the second reply, with all due respect, on page 292, there was various mumbo-jumbo and legal language to the effect that there might be departures but if there were they should be excused.

With respect to the Commission's ability to verify the departures, the Commission's rules provide that an application should be filed in advance or with the filing of a tariff that contains departures and provides that under normal circumstances that application should be filed 30 days in advance of the filing of the rate and only

after investigation under the statute and finding a special case can such rates such as these be allowed to take effect.

The railroads could have filed an application under section 4. They had months ahead of the time they files these rates, and that application could have been subject to disposit by the Commission pursuant to the clearly required standards of section 4.

Now, with respect to the availability of the section 13 relief provision, in SCRAP II it was held that whatever else remained for consideration in a section 13 proceeding, the adequacy of the Commission's determination of an environmental consideration did not remain. It is our position in this case that whatever else remained for determination in a section 13 case, the Commission's earlier failure to resolve the issue of illegality on the face of the tariffs and its failure to proscribe the tariffs from becoming effective could not be determined in the subsequent 13 case on the same rationale that was employed in SCRAP II.

MR. CHIEF JUSTICE BURGER: Your time is expired now, Mr. Caldwell.

MR. CALDWELL: I appreciate that, sir, and Mr. Spencer will take the remaining time.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Spencer.

ORAL ARGUMENT OF HAROLD E. SPENCER, ESQ.,
ON BEHALF OF THE RESPONDENTS, BOARD OF
TRADE OF THE CITY OF CHICAGO, ET AL.

MR. SPENCER: Mr. Chief Justice, and may it please the Court:

From the standpoint of my clients, the crucial issue in this case simply comes down to whether or not the Court is going to decide our case on the basis of the facts and the merits of our case or whether it is going to extend the Arrow principle to cover every situation where the Commission allows a rate to become effective regardless of circumstances and regardless of how arbitrary the Commission's action is.

I think it is quite obvious that this case is not like Arrow and that the Arrow rationale does not apply to this case. The tariffs here are unlawfully discriminatory per se. There is no primary jurisdiction question involved, no question of reasonableness. There is no question of an injunction pending or an investigation. We did not ask for an investigation. That was the theory of the Department of Justice.

There are no disputed issues of fact. The tariff in the case was about four or five pages long and in answer to a question raised earlier by Mr. Justice Rehnquist, I think it is obvious that the issue could have been decided

on the basis of the tariff, the protest and the reply. A straight question of the law is involved, and on the straight question of law no ruling by the Commission is necessary, and if they had made a ruling it would not be binding on the courts.

In other words, this is a question of law which is ripe for review at this time. We say that it is wrong to extend the Arrow principle to cover this type of situation, for reasons which I state. It is wrong for the shippers who are involved in this case and it would be wrong for shippers in other cases who are in the situation represented by the amicus in this case whose case in the Court of Appeals for the District of Columbia is being delayed pending a decision in this case.

The petitioners here argue that a decision for the shippers would create an undue burden on the courts. I submit that this is a diversionary argument. This case is not a typical 15(8) case. It is a very limited type of situation and it would occur very infrequently. It would not occur any more often than the Alaska Pipeline type of situation would occur.

But more importantly, I submit that it is not the function of the courts to disregard the merits of individual cases in order to make life easier for the Commission, the railroads or even for the courts. The law

clearly imposes on the Commission certain obligations and clearly grants to shippers the right of access to the courts to correct arbitrary actions, abuse of discretion and other unlawful actions.

QUESTION: But isn't the question when that access is granted?

MR. SPENCER: Yes, and I believe it is very clear that in this type of situation that access should be granted when the Commission refuses to suspend and investigate. And I should like to make it clear that I draw no distinction between suspension and investigation. The Commission in this case should have taken whatever action is necessary to prevent these tariffs from becoming effective. Now, normally that would be rejection of the tariffs, but suspension accomplishes the same thing. So I say that either of those actions is reviewable. And I believe for the very reasons that you have heard here today, that the shippers need the protection of the courts more now than at any time in the Commission's history, when the Commission is now engaged in the program of de facto deregulation without regard to the statutory standards.

The 4-R Act, which you have heard a good deal about today, did not repeal section 2 of the Interstate Commerce Act. Section 2 prohibits personal discrimination in freight rates, and I submit that if the railroads were

to attempt to raise rates for an individual and not for a corporation or for women and not for men, no one could suggest that could not be judicially reviewed at the time those rates became effective. This case is no different because the whole history of the Commission says that when the shipper furnishes the car, he should be compensated by the payment of an allowance, which was what was done in this case.

The petitioners here have studiously avoided any discussion of the merits of the case. And I suggest that if they could refuse the merits, they would have attempted to do so. Their principal argument is that we can make the same argument in a complaint case to the Commission, and that is true, we can. But I think that that is meaningless and irrelevant in this situation, because why should we be required to do that? What do we need to know that we don't know already? There aren't any disputed issues of fact. We know that the railroads made a 20 percent increase in railroad cars but not in private cars. We know that the rates before the increase were the same, and we know that the shippers who furnish private cars are compensated by a published allowance as required by section 15, paragraph 15 of the Act as it formerly existed.

Furthermore --

QUESTION: Mr. Spencer, if it is that clear, why

would you not promptly start a section 13 complaint proceeding?

MR. SPENCER: Because we want to settle this principle and I think in this case what we had here was a seasonal rate. We had a rate that was in effect for three months and I believe that we were entitled to raise the issue in this case as to the right of the railroads to put this in discriminating between the two different types of cars. Now, by the time the court reached a decision on the merits, the suspension problem had become moot because the rates were already in and were out. So I think the issue could be settled but it is an extremely important question of principle.

Now, they also say in their reply brief, they cite some cases which they say refutes our argument. This is not correct. They say that in the rent or trade case, the Commission found lawful rates of a million dollars a year in railroad furnished cars and $700,000 a year in shipper furnished cars. That is an incorrect statement.

The Commission found the rates in the railroad equipment to be unlawful. As a matter of fact, they found the whole rent or trade scheme to be unlawful insofar as the railroad cars are concerned.

The other cases they cite, the other two cases arose during the period of federal control during World

War I, and in none of the cases was an allowance involved. We don't deny that the railroads can publish rates in private cars and that those rates would be different or could be different from the rates in railroad cars so long as they don't pay an allowance. There are rates to that effect today. But what we say is that they can't do both, that they can pay an allowance and then make a discriminatory rate on top of it, and there is no case in the history of the Commission that says that they can up to this time.

So all we really want to do is to have the opportunity to show the reviewing court that the tariffs were in fact discriminatory as a matter of law. And if we can't show that we are out of court. But if it we can show it, then I think we are entitled to the relief that we ask for.

I would just like in closing to make one remark that I believe that the question of reviewability and the question of remedy selected by the court below are really two different questions. The court below correctly held that the Commission's action was reviewable. Now, as I say, when the case was first presented to the Court below, they denied a TRO, but they denied it on the merits, they didn't deny it because of failure to have jurisdiction to hear that kind of an argument or to hear that kind of a case. They denied it on the balance of the equities.

I think that on the question of reviewability,

that it is very clear that that is reviewable. Now, I have suggested that since a straight question of law is involved that this Court can decide that question and simply tell the Eighth Circuit to order refunds in the case. I think also it would be quite appropriate for this Court simply to tell the Eighth Circuit to go ahead and decide the question of law, but I don't think an investigation is necessary. As I say, we didn't ask for it and --

QUESTION: You contend they should decide the question of law just on the pleadings, with no evidence?

MR. SPENCER: Yes.

QUESTION: Just on the basis of the tariff itself?

MR. SPENCER: On the basis of the facts that we have put up and, of course, on the law that we submitted to the Eighth Circuit. We submitted a brief on the legal issues.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: You have about seven minutes remaining.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.,

ON BEHALF OF THE PETITIONER IN NO. 78-597

-- REBUTTAL

MR. EVANS: Thank you.

Both Mr. Caldwell and Mr. Spencer have argued that the Commission was required to suspend these rates, to

stop them from taking effect. They argued that before the Court of Appeals and they did not prevail. The Court of Appeals ordered only that the Commission must investigate. It did not hold, did not order the Commission to take steps that the respondents here asked for.

The only issue before the Court is the question of the reviewability of the suspension order. They failed to cross-petition and in our view the arguments that they make are simply impermissible at this stage.

Beyond that, it is simply not the case that the issues that were raised by the shippers in this case could be intuited on the face of the papers before the Commission. What was filed were supplements to very large tariffs. I am told they are not quite as large as thebig one, but almost as large as the big one, thousands of individual rates dealing with thousands of points in the southern territory. The supplements themselves were relatively small but they converted all the rates in the broader tariffs to 20 percent larger numbers.

The allegations of fourth section violations, that is the long-and-short haul violations, were presented by the shippers in their protest, filed three weeks after the tariffs themselves were filed. An allegation was made that the tariffs, these thousands of rates reflected hundreds of violations. They cited one example. That one

example respondents have now admitted on brief was in error. Two days before the effective date they submitted a supplementary petition attaching five more examples, again saying that these are just exemplary of pervasive violations.

Well, the Commission has limited resources itself. The shippers who were most affected were able to dig up a total of six, one of which was wrong, in a period up to the second day before the effective date. The --

QUESTION: Suppose the allegations had been -- they said there are hundreds and they are as follows, and they listed 500 of them and they were clear as a bell, what should the Commission do then? Could they refuse to suspend and could they have refused to investigate?

MR. EVANS: Yes, the Commission could. I don't think the Commission would. In our view, there is no requirement that a rate that the Commission -- even the rate that the Commission believes is clearly likely to be unlawful --

QUESTION: Is the United States' and the Commission's position the same on Trans-Alaska?

MR. EVANS: Yes.

QUESTION: Do you remember the footnote in the Trans-Alaska case?

MR. EVANS: Yes, indeed.

QUESTION: Is that still your position?

MR. EVANS: Sure.

QUESTION: This footnote says, "In this court, the United States has modified that position and now apparently concedes that courts have jurisdiction to review suspension orders to the limited extent necessary to insure that such orders do not over-step the Commission's authority."

MR. EVANS: When the Commission has suspended a rate that it has no authority to suspend or at least the allegation is it has no authority to suspend, then --

QUESTION: You say it is different if it is alleged that you have no authority to refuse to suspend?

MR. EVANS: Well, I would say it is different if the allegation goes to the Commission's exercise of the suspension discretion, an acknowledged discretion that it has exercised.

QUESTION: I know, but these allegations say they have absolutely no authority to refuse to suspend in these circumstances, that is the allegation.

MR. EVANS: I think that arguably is a reviewable issue, so long as the remedy sought is not a direction to suspend or direction to investigation but a direction to exercise discretion.

QUESTION: Now, you say you have been absolutely

consistent. Are you remaining so?

MR. EVANS: I believe so. The point I am making is that --

QUESTION: I thought you said it doesn't make any difference how illegal it was alleged, the rates, if it were claimed to be under section 4, the Commission could refuse to suspend them.

MR. EVANS: Yes, the Commission --

QUESTION: Without there being any reviewability of it.

MR. EVANS: Yes. The Commission in my judgment does not have an obligation to suspend even in the face of tariffs that it finds are apparently unlawful. It ordinarily will take action of that sort, but it is not required to do so. And the argument, the analogous argument --

QUESTION: But do you think if they refuse to suspend, that it is reviewable or not?

MR. EVANS: I think if the argument is that --

QUESTION: Then. Then.

MR. EVANS: -- if the Commission has declined to consider whether to suspend, it has refused to exercise a discretion it lawfully has, I think the court may review the refusal to exercise that discretion and order the Commission to exercise its discretion. That is the analogy of the TAPS case.

QUESTION: But it is allaged here that the Commission has absolutely no discretion to refuse to suspend in this case when it is so clearly claimed that there is a violation of section 4 on the face of the tariffs. That is the allegation.

MR. EVANS: That is the allegation --

QUESTION: You don't think that is the reviewability concession in TAPS?

MR. EVANS: I expect that it could be argued that it is not, but the point is that it is not even before the Court. The argument was made in the Eighth Circuit and it was not accepted by the Eighth Circuit. The Eighth Circuit held only that the Commission was required to investigate and ordered an investigation.

QUESTION: Well, I would think you would make the same argument between investigation and suspension.

MR. EVANS: Well, the argument that the respondents have been making is that these tariffs were facially unlawful, the Commission had no alternative but to stop them from taking effect.

QUESTION: I take your argument to be -- to have have an emphasis on the limited order of the Eighth Circuit related only to investigation.

MR. EVANS: That's correct. What the Commission was faced with here were tariffs that were -- it was not

even clear to the Commission on the face of it that these were not plainly paper rates, it is not clear that these shippers -- in fact, they have never really alleged that they are going to be hurt by these rates. It is an ideal occasion for remitting shippers to their section 13 remedies which are available for someone who is actually injured.

I want to correct one other point and that is that the section 13 remedy is available and the Commission's precedents so hold to raise and adjudicate dsection 4 issues, and if a violation of section 4 is found in a section 13 complaint proceeding, damages are available. The measure of damages may draw on concepts of reasonableness and discrimination, but damages are available even if the only violation that is alleged is a section 4 violation. Our reply brief points that out.

QUESTION: Mr. Evans, do you understand the Court of Appeals to have ordered a complete investigation on the entire tariff or just in the five instances that they say were plainly unlawful?

MR. EVANS: It is ambiguous, quite frankly. I have read it a number of different ways a number of different times. I think it can be read either way. The Court's emphasis throughout its opinion is on the alleged violations of section 4, but it also speculates toward the end of its

opinion that there may also be a problem with sections 2 and 3 involving private cars and railroad cars, which Mr. Spencer alluded to.

QUESTION: And do you take the position that these five examples are or are not unlawful?

MR. EVANS: The Commission has not determined it. I don't have a position on it. It has simply not been resolved.

QUESTION: So your submission then has to be that even if they are patently violative of section 4, the Commission refuses to suspend them?

MR. EVANS: Yes, the Commission can make a judgment whether it agrees that they are patently unlawful but even if so, whether it needs to take the action that the respondents have asked for.

QUESTION: There is not a murmur as to whether they think they are patently unlawful or not.

MR. EVANS: What, in the --

QUESTION: Do you think they are patently unlawful based on ---

MR. EVANS: The Commission did not ignore these violations, these alleged violations.

QUESTION: I thought you just answered my Brother Stevens that the Commission hasn't passed on it.

MR. EVANS: It has not resolved it but it alluded

to the fact that there were alleged section 4 violations.

QUESTION: But not patently?

MR. EVANS: Well, the allegations were that they were patent. The Commission obviously didn't see it that way.

QUESTION: Suppose the Commission thought they were patent, could they still refuse to suspend?

MR. EVANS: Yes.

QUESTION: I thought that was your argument.

MR. EVANS: I think --

QUESTION: As long as a search of made, isn't it?

MR. EVANS: That's right.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:23 o'clock p.m., the case in the above-entitled matter was submitted.)

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